



C.R.P.No.4166 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.06.2023

Pronounced on : 10.07.2023

CORAM : JUSTICE N.SESHASAYEE

C.R.P.No.4166 of 2019
and CMP.No.2714 of 2019

1.S.Kamalchand Baid
2.S.Pannalal Baid
3.S.Prathapchand Baid
4.S.Padamchand Baid
5.S.Sumermull Baid
6.M.Rajender

.. Petitioners / Respondents /Plaintiffs

Vs

Jumma Mosque
Rep by its Mutawalli
Old No.176, New No.52, Kutchery Road
Mylapore, Chennai - 600 004.

.. Respondent / Petitioner / Defendant

Prayer : Civil Revision Petition filed under Article 227 of the Constitution of India, praying to set aside the order dated 29.11.2019 passed in I.A.No.1 of 2019 in O.S.No.4345 of 2019 by the XVIII Additional Judge, City Civil Court, Chennai, and allow the revision.



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For Petitioners : Mr.P.R.Raman
for Mr.C.Seethapathy
Assisted by Mr.A.Umasankar

For Respondent : Mr.N.A.Nissar Ahmed
Senior Counsel
for Mr.S.Q.Yusuf

ORDER

The plaintiffs whose plaint has been returned by the City Civil Court, Chennai, over which it is pending for its presentation before the Wakf Tribunal, has challenged the said order in this revision under Article 227 of the Constitution.

2. The case of the plaintiffs in short is that :

- The properties described in 'A' schedule were purchased by their predecessors in title of the plaintiffs, vide three sale deeds executed in 1907, 1925 and 1930. 'B' schedule properties lies adjacent to 'A' schedule properties and the same predecessors in title are the lessees of the properties under the respondent herein. Of them, the respondent have since taken possession of the B schedule property. (In the course of the hearing the counsel for



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the plaintiffs/revision-petitioners informed the court, that the suit for injunction as concerning the B-schedule property has since become infructuous.

- In the 'A' schedule properties, there are residential buildings, wherein the plaintiffs reside. While so, on 15.11.2013 at around 1.00 p.m, some 100 persons claiming to be the men of the defendant, trespassed into the 'B' schedule property and started demolishing the compound wall, which the plaintiffs had put up several years ago, without due process of law. The unwelcome visitors also held out threats to the plaintiffs. Hence, the plaintiffs preferred a police complaint, that has little effect.
- It is in this circumstances, the plaintiffs have laid a suit in C.S.No.18 of 2014 before this Court, for bare injunction to protect their peaceful possession, which later came to be transferred to VIII Additional City Civil Court, Chennai, owing to change in the pecuniary jurisdiction, where it was taken on record in O.S.No.4345/2019.
- Pending suit, the defendant/respondent took out an application in A.No.1812 of 2015 in C.S.No18/2014, which later was



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renumbered as I.A.No.1/2019 by VIII Additional City Civil Court, Chennai. This application was filed under Order VII Rule 11(d) CPC for rejection of plaint. The core contention of the defendant is that the since the said property is a Wakf property belonging to it, as per the provisions contemplated under Section 85 of the Waqf Act, 1995, Civil Court does not have any jurisdiction to deal with the dispute, and the same can be determined only by the Wakf Tribunal. The trial Court, vide its impugned order dated 29.11.2019, accepted the contentions of the defendant and returned the plaint to the plaintiffs directing them to re-present the same before the Wakf Tribunal.

This order is now under challenge in this revision.

3.1 Mr.P.R.Raman, learned Senior Counsel appearing for the revision petitioners/plaintiffs, took this Court through the opening paragraph of the affidavit of the respondent in I.A.No.1 of 2019, wherein he claims that 'A' schedule property is part of a larger property of 144 grounds, and submitted:

- The statutory proforma of the respondent prepared in 1974 refers



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to a scheme decree passed in C.S.No.45/1892, and it is alleged that these properties are part of a scheme decree passed by this Court in C.S.No.45/1892, whereas the proforma was prepared in 1974 and a reference is made to a subsequent scheme decree in C.S.No.89/1910 dated 22.04.1913.

- It is in this backdrop, the Waqf Act, 1954 came into force, and this was later replaced by Waqf Act, 1995. In none of the proforma prepared under these enactments, this 144 grounds property was notified as 'wakf property'. It is in this circumstances, the amendment was brought to the Waqf Act in 2013, under which sub-section (1A) was introduced to Sec.4. It provided for correction for database of Wakf and survey of properties held by the Wakf. Indeed a statement of object and reason also indicates that the intent behind the amendment is to survey the surveyed properties of the Wakf. This implies that its intent is not to survey any property which the respondent may unilaterally consider as its property, but to survey only the properties of the Wakf.
- This apart, the Survey Commissioner appointed under the Act to



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carry the survey, is required to make such necessary enquiry before submitting his report in respect of the survey that he had undertaken. This enquiry was never conducted and it appears that the Survey Commissioner, without enquiry, made a unilateral statement in his report to include the aforesaid 144 grounds property as part of the property of the Wakf. If any property is not earlier surveyed, then it is only the State Government that can conduct the survey under Sec.4(1A), and an unilateral survey cannot be undertaken to include the properties which are not Wakf properties.

3.2 The attempt of the respondent suffers from the following defects :

- (a) that no enquiry was undertaken by the Survey Commissioner under Section 4(3);
- (b) that the property which is not notified as a 'wakf property' at any earlier point of time, then no survey is contemplated, since survey is contemplated only for surveying the property held by a Wakf.



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4.1 Per contra, Mr.N.A.Nissar Ahmed, the learned senior counsel appearing for the respondent has made two candid statement on the aspect of the maintainability of the revision :

- The court below in effect has found that a civil suit is barred under Section 85 r/w Section 7 of the Waqf Act, 1995. This in essence implied that a suit before the civil court is barred under Order VII Rule 11(d) CPC. In fitness of things, the trial court ought to have rejected the plaint under Order VII Rule 11(d) CPC, but it directed to return the plaint as if the case was under Order VII Rule 10 CPC and it must therefore, be read as one passed under Rule 11(d). In order, Order VII Rule 10 CPC can be invoked, the court must have inherent jurisdiction to take cognizance of the civil dispute but may not have the territorial or pecuniary jurisdiction. It is only in those cases, the court even though it has the jurisdiction to take note of the civil dispute or want of pecuniary or territorial jurisdiction, it is required to return the plaint under Order VII Rule 10 CPC. Reliance was placed on the authority of the Bombay High Court in ***Akola Gujarati Samaj vs. Akola Municipal Corporation*** [CDJ 2015 BHC 2121].
- Any order rejecting a plaint is a decree within the meaning of Section



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2(2) of the Civil Procedure Code and hence a first appeal alone is maintainable under Section 96 of the Civil Procedure Code and it is impermissible to invoke the extraordinary supervisory jurisdiction of the High Court under Article 227 of the Constitution of India. Reliance was placed on the decision of this court in ***S.Manoharan vs. T.Mayakkannan and Another*** [2008 (2) CTC 650] and ***Nesammal and Another vs. Edward and Another*** [1998 (3) CTC 165].

4.2 It is the further contention of the learned senior counsel that the authority relied on by the learned senior counsel for the respondent need to be appreciated in the context of the facts situation of a particular case. Indeed in one of the authorities, this court has relied on the judgment of the Hon'ble Supreme Court in ***Hindustan Petroleum Corporation Ltd., Vs C.M.Hariraj*** [(2002) 1 CTC 742] wherein the Hon'ble Supreme Court has laid down the criteria for invoking Article 227 of the Constitution of India and the present case also squarely covered by the same.

5. Replying the same, the learned counsel for the revision-petitioner/plaintiff submitted that the foundation for the respondent for



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including the property of the revision petitioner and others measuring about 144 grounds was done pursuant to the amendment to Section 4 of the Waqf Act, but Section 4(1A) does not authorise it. In other words, when the very Act based on which the respondent has included the property of the petitioner is contrary to the tone, tenor and the spirit of the amended provisions of the Waqf Act then such Act must be construed as falling outside the purview of the Waqf Act and hence the civil court has jurisdiction.

6. If the arguments of the learned counsel for the plaintiff/revision petitioner is analysed to get into its core, it discloses that he does not openly and plainly raises a dispute that the A schedule property is not a Wakf property as to bring it within Sec.6(1) of the Act, in terms of which only the Wakf Tribunal will have jurisdiction to decide any dispute which involves the question if a property is a Wakf-property, but about the manner of declaring the A schedule property as a Wakf property.

7. The contentions of the revision petitioner are two fold: (a) that the Survey Commissioner did not hold an enquiry as contemplated under Sec.4(3) of



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the Act, and thereby he had denied the petitioners, those in actual physical possession of the property, and have been in occupation in continuation of the occupation of their ancestors for several decades since the purchase of the property under four sale deeds, were denied an opportunity of being heard in the matter; (b) the survey undertaken is a second survey which can be carried out only by the Government under Sec.4(6) of the Act, and not by the survey Commissioner under Sec.4(1A) of the Act. And since the entire exercise is contrary to the statute, and its prescriptions, civil court necessarily will have jurisdiction.

8. It is an not in dispute that the respondent-auqaf was originally governed by a scheme decree passed by this Court. But it is no case of the petitioner that a survey of this auqaf had taken place under the Wakf Act, 1954. Preparation of proforma is one thing and survey of the auqaf is another thing. What is significant within the scheme of the Act is that a survey of the auqaf should culminate in its registration. A second survey in terms of Sec.4(6) implies survey of a registered auqaf which will fall within Sec.4(6) of the Act.



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9. The next aspect is that under Sec.6(1) of the Act, where “*any questions arises whether a particular property specified as waqf property in the list of auqafs is waqf property or not*”, it has to be tried only by the Waqf Tribunal. And Sec.85 read with Sec 6(5) of the Act indicates that in all instances where a dispute which fall within the domain of the Waqf Tribunal, it can be tried only by the Tribunal and the civil courts jurisdiction is expressly barred.

10. Here in this case, the revision-petitioners contend that they were not accorded a right of hearing during the survey, and hence the very survey conducted was contrary to the statute. A close reading of Sec.4(3) reveals that the Survey Commissioner may make “*such enquiry as he may consider necessary*”, there by implying that a hearing, both personal or otherwise is not strictly mandated within the scheme of the Act. And those third parties who are, or might be aggrieved by the Survey are not without a remedy either. When the survey completes, it is forwarded to the Government and the latter in turn forwards it to the Waqf Board under Sec.5 for its views and it goes back to the government for it to publish the same in the official gazette. When once a publication is made, then the Tribunal constituted



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under the Act takes control over any dispute in matters falling within its domain.

11. From whichever angle the points raised by the petitioners are approached, they all lead to one conclusion: that only the Waqf Tribunal has jurisdiction to entertain the dispute which the petitioners have raised. In ***Board of Muslim Waqfs, Rajasthan Vs Radha Kishan & Others*** [(1979) 2 SCC 468], the Hon'ble Supreme Court has held that in cases where a third party to the waqf raises a dispute, the limitation period is 12 years and not one year as was provided to the Muttawali or those who are interested in the waqf.

12. So far as the trial Court returning the plaint is concerned, it was argued that Court can invoke Order VII Rule 10 CPC only if the Court has inherent jurisdiction to take cognizance of a civil dispute, and not when its jurisdiction is barred. This is far too a hyper-technical argument. All that the trial Court has told the petitioners is that, "This Court, does not have jurisdiction, take your papers and go and present it to the Tribunal". This approach of the Court is not procedurally obnoxious.



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13. In view of the above, this Court does not find any merit in this petition and the same is dismissed. The petitioner is required to take return of the plaint and present it before the Wakf Tribunal within a period of two weeks from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

10.07.2023

Index : Yes / No
Speaking order / Non-speaking orders

To:

1.The Judge
XVIII Additional Court
City Civil Court, Chennai.

2.The Section Officer
VR Section
High Court, Madras.



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N.SESHASAYEE.J.,

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Pre-delivery order in
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